Phoenix Coca-Cola Bottling Company *and* United Industrial Service, Transportation, Professional and Government Workers of North America of the Seafarers International Union of North America, Atlantic, Gulf and Inland Waters District, AFL–CIO, Petitioner. Cases 28–CA–16595 and 28–CA–16908

November 5, 2002

ORDER DENYING MOTION FOR RECONSIDERATION

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

On August 1, 2002, the National Labor Relations Board issued a Decision and Order in this proceeding finding, in relevant part, that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to comply with the Union's requests for information which was necessary and relevant for it to perform its statutory duties as the collective-bargaining agent for certain of the Respondent's employees.[1] On September 14, 2002, the Respondent, Phoenix Coca-Cola Bottling Company, filed a Motion for Reconsideration arguing that (1) the Board failed to properly analyze its discovery defense; (2) the Board misconstrued its posthearing brief; and (3) Chairman Hurtgen made erroneous conclusions regarding the Respondent's actions. The General Counsel filed a brief opposing the Respondent's motion arguing that the Respondent failed to state extraordinary circumstances and, in essence, that the Respondent raised nothing in its motion that was not previously considered by the Board.

The National Labor Relations Board has considered the matter and finds, in agreement with the General Counsel, that the Respondent's motion lacks merit. First, we find that the Respondent has failed to present extraordinary circumstances warranting reconsideration.[2] Second, we find that the Respondent's motion does not raise any argument not previously considered by the Board. As to the Respondent's argument that the Board failed to properly analyze its "discovery defense," the Board considered and expressly rejected that defense in its decision, which stated that "[the] unfair labor practice charges on which Respondent based this defense were withdrawn prior to the hearing,"[3] thus mooting this defense. Next, we find that Respondent's argument that the Board misconstrued its posthearing brief similarly lacks merit. The Board's reliance on the Respondent's statement in its posthearing brief that it could "now reveal information as requested by the Union" was to make the point, acknowledged by the Respondent in its motion, that the discovery defense became a "nonissue" once the unfair labor practice charges were withdrawn. Finally, we find no support for the Respondent's claim that former Chairman Hurtgen relied on erroneous conclusions when finding that the Respondent persisted in its refusal to provide the requested information after charges were withdrawn. Contrary to the Respondent's arguments, the information it offered to provide at the commencement of the hearing did not include all of the requested information that the judge and Board deemed relevant.

IT IS ORDERED that the Motion for Reconsideration is denied.

Dated, Washington, D.C. November 5, 2002

_____

Wilma B. Liebman, Member

_____

William B. Cowen, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER BARTLETT, concurring.

I join in denying the Respondent's Motion for Reconsideration for the reasons stated in the majority opinion. I write separately, however, to express my view that this case should never have been litigated before the Board. The issue in the underlying case was whether the Respondent Employer violated Section 8(a)(5) of the Act by failing and refusing to provide the Union with requested information. The Union allegedly sought the requested information to determine whether the Respondent had breached the collective-bargaining agreement. Thus, the Union's information request related to potential violations of the parties' collective-bargaining agreement. In such circumstances, I would require the dispute over whether the information must be provided to be addressed in the first instance under the dispute resolution procedures which the parties themselves have agreed to, i.e., through arbitration or, in the absence of applicable procedures for arbitrable resolution, Section 301 of the Act.[1] In my view, where such contractual procedures are available, the par-

[1] 337 NLRB No. 157 (2002). Member Bartlett did not participate in the underlying case. Member Cowen dissented in the underlying case, finding that the Union did not meet its burden of demonstrating the relevance of the requested information. Member Cowen agrees with his colleagues, however, that the Respondent has not raised any arguments in its motion not previously considered by the Board.

[2] Sec. 102.48(d)(1), the Board's Rules and Regulations.

[3] 337 NLRB No. 157, slip op. at 1.

[1] See generally my concurring opinion in *Baptist Hospital of East Tennessee*, 338 NLRB No. 26 (2002) (Board should sua sponte stay its hand and defer processing of 8(a)(5) breach of contract allegations until after the parties have exhausted the possibility of resolving their contractual dispute through their own agreed-upon dispute resolution procedures).

ties should be required to utilize them, rather than invoking the Board's procedure, to resolve their dispute.[2]

[2] Thus, I agree with former Chairman Hurtgen's dissent in *Ormet Aluminum Mill Products Corp.*, 335 NLRB No. 65, slip op. at 3–5 (2001), that a request for information related to a grievance that is pending arbitration is more appropriately addressed by the arbitrator rather than the Board. However, I would go further and also require the parties to utilize their contractual procedures where the information request relates to a potential violation of the contract but no grievance has yet been filed.

Dated, Washington, D.C. November 5, 2002

Michael J. Bartlett, Member

NATIONAL LABOR RELATIONS BOARD